

[*Gibson v. Arizona Public Service Co.*](#), 90-ERA-29 (ALJ Jan. 2, 1992)

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DATE ISSUED: JAN 2 1992

Case Nos. 90-ERA-29

90-ERA-46

90-ERA-53

In the Matter of

CURTIS GIBSON,
Complainant

v.

ARIZONA PUBLIC SERVICE COMPANY,
Respondent

APPEARANCES:

David K. Colapinto, Esquire
For the Complainant

Rebecca Winterscheidt, Esquire
Janet Smith Hepner, Esquire
For the Respondent

BEFORE: Lawrence E. Gray
Administrative Law Judge

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RECOMMENDED DECISION AND ORDER

The Complainant in these matters alleges violations of the employee protection provisions at Section 210 of the Energy Reorganization Act of 1979 as amended, 42 U.S.C. § 5851 (1982) ("Act") and the implementing regulations set forth at 29 C.F.R. Part

24. The Act is designed to protect employees against discrimination and retaliation for attempting to effectuate the purposes of the Atomic Energy Act, as amended, 42 U.S.C. 2011 *et seq.* A hearing was held in Phoenix, Arizona on July 12, 13 and 16, 1990, at which the parties were afforded full opportunity to present evidence and legal argument.

Statement of the Case

These cases stem from complaints dated January 16, 1990 (90-ERA-29), March 16, 1990 (90-ERA-46), and April 24, 1990 (90- ERA-53), which were consolidated by Orders dated May 25, 1990 and June 11, 1990. The complainant alleges that, because he reported safety concerns to the management of Arizona Public Service Company ("APS") and to the Nuclear Regulatory Commission, he was "blacklisted from obtaining direct employment with APS which "lost" his resume and did not select him for a job at Palo Verde, and, in addition, he was suspended from work and received a letter of reprimand. The Complainant seeks back wages and reinstatement. He also requests that the letter of reprimand be expunged from his record.

The Respondent avers that the Complainant's suspension and letter of reprimand were the consequence of his harassment of another APS employee. The Respondent also maintains that it did not "blacklist" the Complainant; rather, other applicants for jobs at an APS site in Palo Verde were selected because they were more qualified than the Complainant. Gibson's resume, submitted during the holiday season, was not lost due to "blacklisting," but was processed in the same manner and in the same time period as other resumes, according to APS.

Findings of Fact

In addition to accepting the Joint Stipulations of Fact of the parties dated July 12, 1990, a copy of which is appended to this Recommended Decision and Order, I make the following findings of fact:

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First Complaint: Suspension and Reprimand

1. Curtis Gibson has been an electrician for the past 29 years. Hearing Transcript (*Tr.*) at 146. Gibson was employed by Butler Services Group when he was sent to Palo Verde in February 6, 1989 to work as a "temporary plant maintenance electrician." *Tr.* at 149. Butler Services was the "contract company for Palo Verde to provide maintenance electricians on a temporary basis" in order to prepare for a planned "major outage" at Units 1 and 3 of the Palo Verde plant. *Tr.* at 155. According to Gibson, "[w]e were brought in to help handle the extra workload, and to work with APS employees. *Tr.* at 158.

2. In April of 1989, Gibson's job duties changed because "valve technicians" were needed. In particular, Gibson would "go in and do preventative maintenance on the valve and certify (that) the equipment met certain conditions. . . ." *Tr.* at 155. Gibson attended a three day class on valve maintenance and procedures. *Tr.* at 155. His supervisor, Gaylon Olson, told him that his valve training and pay raise were the consequence of his work attitude and habits. *Tr.* at 160.

3. Kathy Smith is an electrician helper assigned to the central maintenance shop and she is employed directly by APS. *Tr.* at 190. According to the Complainant, Smith stated that the Butler Services employees were a "bunch of nobodies (who) couldn't do nothing." *Tr.* at 190.

4. Gaylon Olson is the Supervisor of Electrical Maintenance at Palo Verde and has worked for APS for nearly 11 years. *Tr.* at 330. As the supervisor, Olson "was responsible for training and the morale of electrical maintenance personnel." *Tr.* at 331. He supervised the seven foremen and stated that he "worked through foremen to get the work accomplished" and was not in close contact with central maintenance employees. *Tr.* at 334.

5. Olson testified that the Complainant relayed complaints of "bickering" between employees on his shift to Larry (Buck) Buchanan, the training coordinator. *Tr.* at 334-35. Olson asked one of the foremen, Warren Weems, to investigate the problem and "find out what was going on, what was the root of the disruption, if you will." *Tr.* at 336. Specifically, Olson referred Weems to the complainant.

6. Warren Weems, at the time of the hearing, served as Central Maintenance Electrical Supervisor. *Tr.* at 426. In 1989, he was

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a central maintenance electrical foreman and reported to Olson. *Tr.* at 426. Weems has been employed by APS since August 1982. *Tr.* at 426-27. He recalled that morale declined at the central maintenance shop in the Spring and Summer of 1989. *Tr.* at 427. Weems stated that "[i]t seemed like there was just childish bickering . . . just minor things that were getting blown out of proportion . . ." *Tr.* at 428. When Olson sent Weems to investigate Gibson's complaint in the Summer of 1989, Weems interviewed Curtis Gibson, Joslyn Skelly, Manuel Salcido, and Jeff Lunsford. *Tr.* at 430.

7. Weems testified that Gibson "was upset and angry because somebody had made an accusation that one of his boys had been sleeping on the job and that he knew it wasn't true and that these people were liars and backstabbers." *Tr.* at 430-31. Weems recalled that the Complainant refused to work-with Kathy Smith and Manuel Salcido, who were direct employees of APS, or with Dick Wendt, who is a Bechtel employee. *Tr.* at 431. Gibson likewise testified that he told Weems that he did not want to work with Salcido, Wendt, or Smith. *Tr.* at 258. Gibson also told Bill Ecker, another foreman, that, if he had

to work with Wendt, he would go home sick. *Tr.* at 259. Later, Gibson stated that he changed his mind about refusing to work with wendt. *Tr.* at 309-10. Gibson also later testified that he never refused to work with Smith or Salcido. *Tr.* at 311.

8. Weems concluded that "Curtis was a little over protective of his two sons, them being all three on the same shift was causing a little bit of the problem" and he recommended that Curtis be moved to a different shift. *Tr.* at 431. Based upon Weems, recommendation, Olson transferred Gibson back to the day shift. *Tr.* at 337.

9. Michael Mann was the Employee Concerns Representative at Palo Verde and had worked for APS for seven years. *Tr.* at 61. Mann stated that he would "take concerns and assure that they got to the proper management for resolution." *Tr.* at 62. He fielded technical concerns as well as concerns of harassment and allegations of retaliation. *Tr.* at 66. Mann investigated problems in the maintenance shop which arose between contract employees and APS direct employees as well as between central maintenance shop employees and management. *Tr.* at 68-69. Mann recalls that there was "[f]inger pointing, name calling, things of this nature." *Tr.* at 70. Mann presented questionnaires to

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the central maintenance employees to find out if they felt that there would be retaliation for "whistleblowing." Complainant's Exhibits (Cx.) 5-15; *Tr.* at 73-77. He stated that he knew of no employee concerns about management retaliation if safety concerns were raised. *Tr.* at 70.

10. Kathy Smith filed a complaint with Mann stating that she had been harassed by Gibson among others. As a result, Mann opened Employee Concern File No. 89-080 and conducted an investigation during the same time period as another conducted by Robert L. Oliver, a foreman. *Tr.* at 89. Mann interviewed Gibson on November 13, 1989 about File No. 89-080. *Tr.* at 105; Respondent's Exhibit (Rx.) 3-4. During the interview, Mann asked that Clyde Steward and Wade Asbury join him because Gibson "was getting extremely upset" over an issue about which Mann had questioned him. *Tr.* at 106. Mann stated that "one of (Gibson's) sons had outstanding warrants for his arrest" which APS did not know about, but that it would have to be reported. *Tr.* at 107.

11. Gibson became "extremely angry." Mann stated that "[h]e became angry to the point that he had tears in his eyes. He was making threats". *Tr.* at 108. Gibson wanted to know who told Mann about the warrants on his son. *Tr.* at 109. Mann stated that Gibson "was going to find out who did it. He was going to take care of the problem. If anything happened to his son, that person was going to pay for it."

12. Mann recalled that he told Gibson to "not go back out there and cause yourself any problems by harassing anyone." *Tr.* at 109. Although Gibson accused Kathy Smith of telling Mann about his son, Mann told him that "the information came from someone else." *Tr.* at 112. Mann testified that Gibson told everyone that Kathy had "snitched on

his son." *Tr.* at 112. With the institution of a new employee concerns program, Concern File No. 89-080 was reassigned from Mann to Robert Oliver. *Tr.* at 112-13. At the close of the investigation, Oliver and Mann told the central maintenance employees "to conduct themselves in a professional manner, to make sure that everything they were doing was done in a professional manner." *Tr.* at 115-16; *Rx.* 5.

13. Oliver subsequently asked that a memorandum be issued to stop the "[b]ickering between some APS direct employees and contract employees." *Tr.* at 493.

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14. Gaylon Olson and Michael Mann wrote a memorandum dated December 1, 1989 which directed that harassment among employees would cease. *Tr.* at 338-39; *Rx.* 5. Olson testified that he added the disciplinary sentence to the second paragraph of the memorandum because he wanted "the bickering and harassment to stop." *Tr.* at 338-39. Olson stated that if a contract employee violated the memorandum "[w]e would release that (employee) back to their company." *Tr.* at 339.

15. Oliver read the December 1, 1989 memorandum to employees at the central maintenance shop. *Tr.* at 496. The employees then signed a form to indicate that the memorandum was read to them and that they understood its contents. *Rx.* 5.

16. Gibson was late to the meeting. *Tr.* at 125 and 496. Oliver read the memorandum to Gibson who signed the form. *Tr.* at 194. *Tr.* at 275 and 496. Gibson testified that he understood that "harassment and bickering was supposed to stop" but that he was anxious to leave because it was past "quitting time." *Tr.* at 275.

17. Mann testified that, on December 10, 1989, Kathy Smith "complained that she was being harassed again." *Tr.* at 116. Smith asserted that, as she entered the central maintenance shop, another employee was sitting in her chair and Gibson told him, "Get up, the bitch is here." *Tr.* at 117. Mann stated that he referred the matter to Oliver, "[T]his was the second time that Curtis Gibson had harassed the same person." *Tr.* at 118.

18. Oliver investigated Smith's complaint and interviewed Jerry Berlin, who had been sitting in her chair; he also interviewed Joe and Curtis Gibson. *Tr.* at 277 and 499; *Rx.* 10 and 31. Curtis Gibson stated that, realizing that Smith was in the room, he had told Jerry Berlin, "'Jerry, you'd better get up out of her chair; the witch is back.'" *Tr.* at 201-202 and 277.

19. Gibson testified that "I not only thought I might be in trouble. . . . but when Bob (Oliver) asked me about this statement, my antenna went up." *Tr.* at 278. Gibson stated that all other disputes with Smith and other employees occurred before December 1, 1989 and that there were no other disputes after that date. *Tr.* at 280-82.

20. Mann recalled that Oliver's investigation substantiated that

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Gibson had said "[t]he witch is back." *Tr.* at 119. Mann stated that no other violations of the December 1 memorandum were reported. *Tr.* at 119. Mann further noted that in an investigation that pre-dated Concern File No. 89-080), Smith "considered Mr. Gibson a very good friend." *Tr.* at 136.

21. Oliver reported his findings regarding Smith's complaint to Gaylon Olson. *Tr.* at 502. Oliver recalled that Olson "remarked that it looked like he had no choice, that he was going to have to release Mr. Gibson back to Butler." *Tr.* at 502. Oliver testified that he was not surprised about the decision. *Tr.* at 502. Oliver also noted that Gibson called him at home to let him know of his safety concerns *after he reported his findings to Olson*. Gibson had raised no safety concerns with Oliver during the investigation process. *Tr.* at 503-505.

22. Gaylon Olson stated that he initiated Gibson's release "almost immediately" in the time period between December 13 and 15. *Tr.* at 341-42. Olson recalled that "I thought it was prudent at that time to take immediate action and let people know that what I had said and what Bob Oliver had put out in meetings, that we would not tolerate these comments any longer." *Tr.* at 342. Olson then called Employee Relations and spoke with Lisa Ciderquist to say that he "had a Butler employee that [he] wanted to release. . . ." *Tr.* at 342.

23. Olson testified that Gibson had never raised safety concerns to him; he found out about the concerns only upon Gibson's return from what turned out to be a three day suspension. *Tr.* at 344- 45. On Gibson's return, Olson stated that his foremen noticed a change in Gibson's attitude and work habits for the worse. *Tr.* at 364 and 377. Olson stated that "Ron Eban called me . . . and said that Curtis had gone to (James) Levine and then he went from Levine to the NRC." *Tr.* at 365.

24. Betty Drake serves as the Human Resources Clerk at Palo Verde and she "handles the contract labor requests. I *Tr.* at 398- 99. She has held this position since March of 1990 and is supervised by Lisa Ciderquist. *Tr.* at 399. From October of 1989 through January of 1990, Drake served as the Site Representative for Butler Services Group, in which capacity, she stated, "I had contact with supervisors in the different departments and the employees concerning having people coming to work or laying people off and keeping the payroll." *Tr.* at 400.

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25. Pursuant to Olson's request, Drake called Gibson and told him that he was released. She recalled, "I told him that he needed to come out to the site and do an exit checklist and turn in his badge." *Tr.* at 404; *Cx.* 31.

26. Gibson stated that, after Drake informed him of the release, "I asked her to drop me off by - or go with me to Mr. Levine's office, that I had some things to say and I wanted to be sure that they were heard." *Tr.* at 204. Drake stated that Gibson "said that he had some concerns and he wanted to see Mr. Levine and he said that if he didn't have a job, he said, he had Mr. Gaylon by the balls. And he said, if he didn't have a job, Gaylon wouldn't have a job either." *Tr.* at 405. Gibson denies stating that he had Olson "by the balls." *Tr.* at 601.

27. On the same day, Drake drove Gibson to James Levine's office. *Tr.* at 205 and 406.

28. James Levine is the APS Vice President for Nuclear Production and was part of the new Senior Management team at Palo Verde. *Tr.* at 28-29. Levine recalled that Gibson requested a meeting with him on December 19, 1989. *Tr.* at 41. Max Arbolida, who was with the Human Resources Department, and Betty Drake, as a Butler Services representative, were present at the meeting. *Tr.* at 41. Levine recalled that Gibson was upset over his release and "made a categorical statement that he was going to the NRC." *Tr.* at 42-43. Levine stated that Gibson "told me he was not going to tell me what the other concerns were and, at that time, I told him he had an obligation to either state the concerns to APS or, if he did not feel comfortable with that, to state the concerns to the NRC." *Tr.* at 43. Gibson testified that Levine did not discourage him from going to the NRC." *Tr.* at 282.

29. Gibson told Levine "that I was being fired or had been fired and that I was accused of doing something that I hadn't done and that I had some safety concerns that should be addressed. . . ." *Tr.* at 205. Gibson further stated that "I believe I did indicate to him that I hadn't been but that I possibly would go (to the NRC)." *Tr.* at 205. Levine requested that Kirby, who was part of Palo Verde management, inquire about the circumstances of Gibson's release. *Tr.* at 44.

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30. In the meantime, at Levine's suggestion, Gibson met with Arbolida "to try and get these problems identified so that he could investigate it." *Tr.* at 206. Gibson took notes at the December 19 meeting with Levine (*Cx.* 33) wherein he noted an intention to go to the NRC. *Tr.* at 209-11. Gibson went to the NRC office at Palo Verde and spoke with an inspector, Doug Coe. *Tr.* at 210. Gibson showed Coe excerpts from a technical repair manual (*Cx.* 34) to use in explaining the safety problems. *Tr.* at 213. Gibson also kept notes of the concerns which he expressed to the NRC. *Tr.* at 214-15; *Cx.* 35-36.

31. Gibson stated that he expressed several safety concerns. The first is referred to as the ALARA concern. Gibson testified that, when working on valves, he would have to crank the handle "as many as 10,000 times." *Tr.* at 162. Gibson stated, "I was told that these could be turned electrically by a drill motor or something, and tried to speed up the operation and get out of the radiation exposure as quickly as possible." *Tr.* at 162. Gibson recalled that his recommendation was rejected "by the engineering people." *Tr.* at 165.

Gibson also stated that he believed that the ALARA concern was voiced at the weekly safety meetings held in the central maintenance shop. *Tr.* at 244-45 and 249.

32. The record demonstrates that Gibson submitted his ALARA concerns in September of 1989 and that his ALARA supervisor concurred with them. *Cx.* 29. The ALARA engineer noted that Gibson's suggestion for use of a "counter" was a good one, but that it was not feasible. The engineer stated that "[f]uture suggestions on a counter more specific to this application is needed and welcomed." The engineer also rejected Gibson's suggested use of an "electrically driven pony, stating that the valves were designed for manual turning and the "pony" could exert "excessive torque/thrust" thus damaging the valve. *Cx.* 29.

33. A second concern is referred to as the 13JZZI004 work change order. *Tr.* at 166. Gibson stated that the document was incomplete and caused a lot of confusion. Gibson raised the work order concern in May of 1989 but testified that other employees voiced concern over the document as well as "[t]here was a lot of confusion in the shop about that particular document. . . ." *Tr.* at 167 and 250.

34. Another concern expressed by Gibson dealt with the maintenance of the "third gear box." *Tr.* at 170 and 252. The maintenance procedures did not address greasing the third gear

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box. *Tr.* at 170. Gibson stated that the first time he spoke of the gear box issue was to Levine after his release. *Tr.* at 254. He stated that other employees "may have" also voiced concern over it. *Tr.* at 252.

35. A fourth concern was work order 389725. *Tr.* at 255-56. In November of 1989, Gibson voiced a concern to Weems that he did not know enough to do "coil control rod assembly." *Tr.* at 177- 78. He worked only on shift on work order 389725. *Tr.* at 255- 56. He encountered damaged parts and Weems said to use what they had to repair them as there were no replacement parts. *Tr.* at 179.

36. A fifth concern that Gibson had was regarding "Q related parts and Q equipment" which are necessary to the safe operation and the safe shut-down of a nuclear plant. *Tr.* at 180-81. Gibson noted, however, that other employees had discussed the issue of Q related parts. *Tr.* at 257.

37. At a second meeting with Levine, Gibson stated that he had another concern which he was not going to reveal to Levine, and Levine stated that Gibson had a duty to report the concern to APS or the NRC. *Tr.* at 52 and 283. Doug Coe, at the NRC, told Gibson that he would get a court order to force him to reveal the last concern. *Tr.* at 285. Gibson told people at Palo Verde that "'I haven't played all my cards.'" *Tr.* at 286. Gibson met with Coe to tell him the last concern. *Tr.* at 285. Gibson further stated that he knew that he

would have to be reinstated because he raised safety concerns with the NRC. *Tr.* at 28; *Cx.* 37.

38. Mike Gibson, who is the complainant's son, testified that his father "was open in the safety meetings and we talked about any concerns that any employee had . . . he was vocal in the meetings." *Tr.* at 561. Mike Gibson stated that APS "told us we could go to the NRC" with safety concerns. *Tr.* at 562.

39. Upon review of Kirby's investigation and Gibson's complaint, Levine reinstated Gibson, stating that "I did not condone the bickering," but that the "offense was not a severe enough level at that time to require a release." *Tr.* at 46. Gibson received a reprimand and a three day suspension. *Tr.* at 48.

40. Levine testified that he had never heard of Gibson or of his safety concerns until the December 19 meeting. *Tr.* at 52 and 57.

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Levine stated that he did not usually involve himself in contractor release discipline issues. Levine further stated that usual APS policy was that contract personnel be disciplined by the contractor company, e.g., Butler Services. *Tr.* at 48.

41. Drake, as the Butler representative, was asked to write the reprimand but "knew nothing about the . . . legal parts of the letter or anything." *Tr.* at 408. The reprimand (*Cx.* 37) was issued on APS stationery and Drake concurred with it. *Tr.* at 408.

42. David Heler, an employee of APS since 1985, was Supervisor of Employee Relations and he drafted Gibson's reprimand. *Tr.* at 379. Heler worked on "employee issues, working with supervisors on solving personnel problems, providing advice as to procedures, guidelines, things relative to human resources." *Tr.* at 380. At the request of Levine, and through Arbolida, Heler stated that he "worked with the central maintenance department in issuing a letter of reprimand through the consultation of his employer, Butler Services. . . ." *Tr.* at 381.

43. Heler testified that "[t]ypically we don't reprimand contractors with letters of this nature, but at the intervention (sic) of Mr. Gibson to intercede, Mr. Levine made the decision to go ahead and issue the letter so we issued it on (APS) stationery." *Tr.* at 382. Drake agreed to issue it on APS stationery. *Tr.* at 383.

44. A meeting was held between Gibson, Drake, Heler, John Stout, and Ron Eban at which time Gibson was told of the three day suspension and letter of reprimand and that he could return to work. *Tr.* at 217 and 383.

45. Heler recalled that Gibson said, "I knew you had to do that." Heler asked Gibson what he meant, and he said, "Well, you know, I knew that I had raised concerns." Heler

said, "Well, that's a separate issue. The actions that we took were based on the issues surrounding the December 1st memo and the incident that took place on December 10th." *Tr.* at 384. Heler did not know of any other contract employees who were reprimanded on APS stationery but, likewise, could not recall other employees asking Levine to intervene. *Tr.* at 396.

46. Gibson stated that, upon return to work, "[t]hey did change me to another crew and informed me that I would not be going back

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to the same crew but I would be going to Mr. Eban's crew." *Tr.* at 217. Gibson stated that it seemed that the foremen were "cautious around me." *Tr.* at 221. He told Weems "I want you to know that your name did come up, but I think you'll probably survive the investigation." *Tr.* at 220. Weems recalls that Gibson told him "that they had him on his back and he had to kick the only way he knew how to keep his job, and that I didn't need to worry that he didn't implicate me in anything." *Tr.* at 434.

47. After his return, Gibson worked only one month because the Butler Services contract expired. *Tr.* at 361.

Second Complaint: Processing the Resume

48. Gibson testified that he applied to work as a direct APS employee around December 26, 1989, but he could not recall the person who received his resume. *Tr.* at 221 and 228; *Cx.* 38. There were several plant electrician openings. *Tr.* at 222. Gibson called Human Resources to inquire as to the status of his application "[a]nd they informed me that they couldn't find it. It had been misplaced or lost or -- they had no record of it in other words." *Tr.* at 224. Gibson applied for direct employment again in February or March of 1990. *Tr.* at 227; *Cx.* 39. In March of 1990, Gibson was notified that his first application was found. *Tr.* at 289. Although Gibson alleges that William Ecker made reference to a "blacklist", Olson testified that, in the 11 years he had been at Palo Verde, he never knew of a blacklist. *Tr.* at 224-25; 346.

49. Sharon Jean Pritchard has been the Supervisor of Employment and Contract Labor Administration at APS and she stated that "[b]asically, we're responsible for the recruiting and staffing of all APS contractor personnel for the site." *Tr.* at 519. Pritchard testified that, around December 28, 1989, "we were receiving (resumes); we were not processing (them)." *Tr.* at 526. She further testified that it took an average of three months to place the application into the computer tracking system. *Tr.* at 527. Pritchard explained that "[t]o begin with, we had short vacation coverages because it was the holiday season and the end of the year and vacations, people using it." *Tr.* at 527. Moreover, Pritchard stated that "[w]e had a lack of trained support staff. We had one individual that was responsible for all recruiting as well as the activity responding to all of the

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resumes at that time. And we were coming off an outage and going into an outage." *Tr.* at 527. Pritchard also noted that her recruiter, "who was responsible (for collecting resumes), was attending job fairs and was recruiting during that period as well." *Tr.* at 529. Pritchard stated that approximately 1800 applications were received between December of 1989 and March of 1990. *Tr.* at 527.

50. Pritchard testified that Lisa Ciderquist was her supervisor. She also stated that she had never heard of the Complainant or saw his letter of reprimand until she began to prepare for the hearing of this matter. *Tr.* at 528; 529; 539. Her staff, too, was unaware of Gibson. *Tr.* at 528.

51. Pritchard testified that Gibson's resume was received on December 28, 1989 (*Cx.* 38) and was processed into the computer tracking system on March 21, 1990. *Tr.* at 529. She stated that other resumes which were received in December 1989 were not entered until March of 1990. *Tr.* at 530; *Rx.* 32. Pritchard stated that Gibson's second resume (*Cx.* 39) was received on March 5, 1990 and was entered into the computer tracking system on March 28, 1990. *Tr.* at 535.

Complaint Three: Referrals from Cal-Test

52. In the Spring of 1990, Weems "was in charge of the group that was sent to unit two to take care of motor operated valve rework and testing." *Tr.* at 434. The work involved valve testing and preventative maintenance. *Tr.* at 435. Weems testified that there were 87 valves to work on during the 95 day outage and, after 40 days, only one valve had been completed. *Tr.* at 437. As a result, Weems went to a contract company, Cal- Test, for referrals. *Tr.* at 438. Weems needed eight electricians, and Cal-Test sent 17 resumes. *Tr.* at 438. Weems selected the eight electricians (*Rx.* 14-21) and rejected the rest, including Gibson (*Rx.* 22-30). *Tr.* at 443-49; *Cx.* 40-41.

53. Weems stated, "I wanted somebody with nuclear experience. I wanted somebody with a little bit of formal training, as much as possible. Also, I put quite a bit of stock in apprenticeships. And I wanted somebody with valve experience; valve training; and, just past job performance." *Tr.* at 445.

54. Weems testified that the "clearly superior" resumes were

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those of William Voight, James Coleman, Jessie Fitterer, and Greg Gilliland. *Tr.* at 446. The next four applicants to be selected were Jeffrey Whitford, Mike and Joe Gibson, and Dan McCleod. *Tr.* at 449. The four least qualified applicants were Steve Anderson, Thomas Cook, Steven Murray, and Richard Butorac. *Tr.* at 452.

55. Of the eight electricians who were selected, Weems stated, "I know that Bill Voight and Joe and Mike and I think Jim Coleman had all expressed concerns over (work order) 13JZZI004, and the way it was structured." *Tr.* at 455. Moreover, Weems stated, "I knew Mr. Coleman had discussions with the NRC." *Tr.* at 455. Coleman stated that he raised a safety concern to APS management in the past and was rehired by APS. *Tr.* at 592. Weems testified that he, too, had raised safety concerns. *Tr.* at 455.

56. Weems knew the background of most of the applicants he selected because he worked with them. *Tr.* at 490. Gibson's safety concerns were not the cause of his rejection. *Tr.* at 455. Weems stated that "the only nuclear experience that (Gibson) had was at Palo Verde. He didn't show me much in the way of education, private tutoring . . ." *Tr.* at 453. Weems also noted that Gibson never had an apprenticeship and his "past work experience was one of the things that I was rating, and I didn't think his quantity of work was up to par with the rest of the people I picked." *Tr.* at 453. Weems stated that "it seemed like he spent too much time in the shop talking, doing other things, when he should have been working." *Tr.* at 454. Weems also testified that Gibson's earlier refusal to work with others in the Summer of 1989 was one consideration which led to Gibson's rejection. *Tr.* at 453.

57. Gibson stated that he felt qualified for the positions at Palo Verde. *Tr.* at 233. He believed he had more valve experience than Joe Gibson and Jesse Fitterer, although he never saw their resumes. *Tr.* at 235-36. However, Gibson later testified that Fitterer was "very knowledgeable, and that he "had no quarrels with him" being selected by Weems. *Tr.* at 296-97.

58. Prior to Weems' selection of electricians for the Palo Verde valve team, Cal-Test called Gibson regarding a job opportunity in February of 1990 at Diablo Canyon. *Tr.* at 292. Gibson declined to take the job as his two sons were at Palo Verde and his daughter was getting married. *Tr.* at 292 and 309.

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Conclusions of Law

Discrimination with respect to the terms and working conditions of an employee because he has reported safety concerns is prohibited by the Act. Specifically, Section 210 reads, in pertinent part, as follows:

No employer, including a Commission licensee, or a contractor or a sub-contractor of a Commission licensee or applicant, may discharge any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) --

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2011 *et seq.*), or a proceeding for the administration or

enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

42 U.S.C. § 5851. The issues presented for adjudication in this case are as follows: (1) whether the letter of reprimand and suspension constitutes discriminatory conduct in violation of the Act; (2) whether the Respondent engaged in "blacklisting" in delaying the processing of Complainant's resume; and (3) whether the Respondent engaged in "blacklisting" in failing to select the Complainant for the Palo Verde job.

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To sustain a discrimination claim under the employee protection provisions of the Act, a complainant must establish a *prima facie* case, by a preponderance of the evidence, consisting of the following elements: (1) the party charged with discrimination is an employer subject to the Act; (2) the Complainant qualifies as an employee under the Act; (3) the employee engaged in protected activity; (4) the Complainant was discharged or otherwise discriminated against with respect to his or her compensation, terms, conditions, or privileges of employment; (5) the employer knew or had knowledge that the employee engaged in protected activity. *Pogue v. Dept. of the Navy*, Case No. 87-ERA-21 Slip Op. (Decision of the Sec'y. May 10, 1990); *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2 Slip Op. (Decision of the Sec'y. April 25, 1983); *Mackowiak v. University Nuclear Systems Inc.*, 735 F.2d 1159 (9th Cir. 1984). If the employee establishes his *prima facie* case, then the burden shifts to the employer to articulate legitimate, nondiscriminatory reasons for its actions. If the employer rebuts the *prima facie* case, the burden shifts back to the employee to demonstrate that the proffered reasons are mere pretext. Thus, the ultimate burden of persuasion, by a preponderance of the evidence, rests with the complainant. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Mt. Healthy City School v. Doyle*, 429 U.S. 274 (1977).

The Employer-Employee Relationship

The Act does not define the term "employee" and, therefore, the employer-employee relationship must be determined on a case-by-case basis. The Complainant in this case was an employee of Butler Services, a contractor which provided electricians on a temporary basis. It is consistent with the Act's policy of encouraging maximum oversight of nuclear power plant construction activity, to afford coverage to employees of subcontractors and independent contractors. *Hill v. Tennessee Valley Authority*, Case No. 87-ERA-23 (Decision of the Sec'y. May 24, 1989). It is determined, therefore, that the Complainant qualifies as an "employee" under the Act.

Protected Activity

The Complainant reported nuclear safety concerns to both APS management as well as the NRC's resident inspector, Doug Coe.

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It is well-recognized that the filing of complaints with the NRC constitutes "protected activity." The Ninth and Tenth Circuits have also held that the filing of internal safety reports or complaints with an employer also qualifies as protected activity. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984); *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505, 1513 (10th Cir. 1985). *See also Consolidated Edison Co. v. Donovan*, 673 F.2d 61 (2d Cir. 1982). The Secretary of Labor likewise includes internal complaints under the rubric of protected activity. *Bivens v. Louisiana Power & Light*, Case No. 89-ERA-30 slip op. (Decision of the Sec'y. June 4, 1991); *Pogue, supra*. As a matter of law, the complaints asserted by Gibson to the NRC and to APS management constitute protected activity.

First Complaint: The Suspension and Reprimand

As previously noted, the Complainant has established that he engaged in protected activity. Moreover, the record evidences that the Respondent suspended Gibson for three days and placed a letter of reprimand in his file, which is sufficient to constitute discriminatory conduct. The record further demonstrates that the Complainant generally raised safety concerns at weekly meetings in the central maintenance shop. It is noted that his ALARA concern is documented as being rejected by the engineering staff. As a result, the Complainant has established that the Respondent had knowledge that he engaged in protected activity and has demonstrated a *prima facie* case of retaliation.

The Respondent, however, has sustained its burden of articulating legitimate, nondiscriminatory reasons for the suspension and letter of reprimand. Specifically, the Respondent asserts that its actions were the direct consequence of Gibson's violation of a memorandum dated December 1, 1989. Designed to curb the "bickering" and harassment occurring in the central maintenance shop, the memorandum stated that the "[t]hese incidents will not be tolerated" and that an employee found in violation of the memorandum "could face disciplinary action and possible termination."

It is undisputed that, subsequent to issuance of the December 1, 1989 memorandum, Kathy Smith filed a complaint that Gibson had made a derogatory comment toward her. Upon investigation, it was confirmed that Gibson said, "The witch is

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back." The Respondent asserts that these events provided the impetus for Gibson's suspension and letter of reprimand.

The burden now shifts back to the Complainant to establish by a preponderance of the evidence that a causal relationship exists between the protected activity and the disciplinary action. The evidence in this case fails to establish such a relationship.

The Complainant testified that he raised safety concerns from the time he started working for the respondent in February of 1989. By his own testimony, as well as that of his son Michael Gibson, the complainant was "very vocal" at the weekly safety meetings in the central maintenance shop. The record also demonstrates, through testimonial and documentary evidence, that Gibson's communication of safety concerns was well received by APS officials, notwithstanding disagreement as to their resolution. Indeed, the record evidences that Gibson filed ALARA complaints in September of 1989 with which his ALARA supervisor concurred. The ALARA engineer rejected Gibson's recommendations with an explanation and stated that he "welcomed" future suggestions.

Gibson's remaining concerns are not documented in the record prior to his violation of the December 1 memorandum. Gibson conceded that his concerns regarding work order 13J22I004 as well as his concern over "Q related parts" were voiced by others in the central maintenance shop. Likewise, as to the maintenance of the third gear box and work order 389725, Gibson noted that other employees also might have raised these concerns.

The record fails to support a finding that Gibson made unusually numerous or serious safety complaints from which a retaliatory motive could be inferred. *Lockert v. Dept. of Labor*, 867 F.2d 513 (9th Cir. 1989). Indeed, his safety concerns seem to have been common knowledge among employees and management of the central maintenance shop. Moreover, there is no evidence that APS sought to suppress the concerns which Gibson voiced. Gibson did not allege any pattern of discriminatory or retaliatory conduct by APS as each of these concerns was brought to their attention. Rather, it appears that the concerns were handled in the ordinary course of business. Gibson acknowledged that APS encouraged the repeating of safety concerns through memoranda and safety meetings and, indeed, Gibson testified that

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Levine encouraged him to express concerns to APS or the NRC.

The fact that Gibson's release was initiated within three to five days of the December 10 violation also militates against an inference of retaliatory motive in light of his long-term engagement in protected activity over the prior months. There is ample testimony in the record to establish that, prior to issuance of the December 1 memorandum, the central maintenance shop employees engaged in a substantial amount of "bickering," which was not condoned by APS management. Gaylon Olson believed that the "immediate action" of releasing Gibson back to Butler was "prudent" in order to convince APS employees that further harassment and bickering would not be tolerated. Levine changed the release to the three-day suspension and letter of reprimand in light of the nature of Gibson's comment, stating that he did not "condone the bickering" but that outright release was too

onerous a response. It is reasonable to conclude from the foregoing that Gibson's suspension and letter of reprimand were not the consequence of his voicing of safety concerns.

Moreover, the record does not demonstrate that Olson, who initiated Gibson's release, had knowledge that the Complainant engaged in protected activity. Indeed, Olson testified that Gibson never raised safety concerns to him prior to the release and, only upon Gibson's return from the three day suspension, did Olson learn of his reporting of safety concerns to the NRC and APS management. The Complainant has offered no evidence to establish that Olson knew of his safety complaints and that they played a part in his release.

If an employee receives little or no explanation regarding disciplinary action taken against him, or if conflicting reasons are advanced for the action, then a retaliatory motive may be inferred. However, the record in this case demonstrates that Gibson was informed that his release, as well as the subsequent letter of reprimand and suspension, were the result of his violation of the December 1 memorandum, as substantiated through an investigation by APS management.

The Complainant has asserted that disciplinary action in the form of a reprimand letter issued on APS stationery deviated from established policy, thus giving rise to an inference of retaliatory motive. Gibson stated that such letters were normally issued by the subcontractor. This is supported by the testimony of APS officials, including James Levine.

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Olson followed APS policy by scheduling Gibson's release back to Butler Services. It was Gibson who initiated direct APS action by requesting the intervention of James Levine. Levine was a new member of the APS management team at Palo Verde, and he testified that, customarily, he did not intervene in such matters. Levine had the letter of reprimand issued on APS stationery, with the agreement of Betty Drake as representative of Butler Services, for the sake of expediency. Levine's testimony and demeanor were credible and, notwithstanding its deviation from standard APS policy, issuance of the letter of reprimand on APS stationery does not give rise to an inference of retaliatory motive, nor do I so infer.

In addition, it is significant to note that the Complainant sought to engage actively in protected activity *after* his job was threatened. This is expressed in Gibson's handwritten notes, dated after his release, wherein he questioned, "How does one *become* a whistleblower to protect his job?" Cx. 33 (emphasis added). Weems and Heler, of APS management, testified that Gibson used the voicing of safety concerns as pressure to be reinstated to his job. Drake, a Butler Services representative, likewise testified that Gibson told her that he had Olson "by the balls" as they were en route to meet with Levine. Although Gibson denied making the statement, the record demonstrates that

Gibson intended to use his safety concerns to overshadow the December 10 incident and provide pressure for reinstatement to his job.

Indeed, to apply such pressure, Gibson threatened to withhold one concern from both APS and the NRC. Levine told him that he had a duty to report the concern and Doug Coe, of the NRC, told Gibson that, if necessary, he would get a court order forcing him to reveal the concern. Gibson, on the other hand, told Palo Verde employees that he had not "played all (of his) cards" and that he knew he would have to be reinstated because he had raised safety concerns. The Act is not blind to the motives of employees who seek its coverage. *Becoming* a "whistleblower" in order to protect one's otherwise threatened job is not an activity that the Act is intended to protect.

Upon review of the record as a whole, it is my determination that Gibson's safety concerns played no part in his release or in its subsequent change to suspension and a letter of

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reprimand. Considering the long-term bickering and harassment which occurred in the central maintenance shop, it is reasonable to conclude that Levine, Oliver, and Olson treated the contents of the December 1, 1989 memorandum seriously. Gibson was the only employee to be reported as violating the December 1 memorandum, and the ensuing investigation by Oliver confirmed the violation. The Complainant has introduced no evidence to suggest threats or retaliation against other employees for engaging in protected activity or to reveal disparity of treatment from other employees who did not voice safety concerns.

It is my determination from the foregoing that Gibson would have been suspended and a letter of reprimand placed in his file regardless of his assertion of safety concerns.

Second Complaint: Processing the Resume

The Complainant alleged that the three month delay in processing his resume was the result of "blacklisting" for his expression of safety concerns. The Secretary of Labor defines the term blacklisting as "[a] list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or among whom it is intended to circulate . . ." *Engenrieder v. Metropolitan Edison Co.*, 85-ERA-23 Slip op. (Decision of the Sec'y. April 20, 1987)(citing Black's Law Dictionary 154 (5th ed. 1979)). Blacklisting an employee, as a consequence of his engagement in protected activity, is an express violation of the Act pursuant to 29 C.F.R. § 24.2(b). In the present case, however, there is no evidence, circumstantial or otherwise, to suggest that the Complainant was blacklisted or his resume deliberately lost.

To the contrary, Sharon Pritchard testified that Gibson's resume was received on December 28, 1989, in the midst of the holiday season when most of her staff was on

vacation. Moreover, the individual who was charged with processing the resumes was often out of town at job fairs. Pritchard further testified that 1,800 applications were received between December 1989 and March 1990, and that it took an average of three months to process each application. There is evidence in the record of other resumes submitted in December 1989 that were not processed until March of 1990. Pritchard denied knowledge of Gibson or the letter of reprimand which he had received before she began preparing for the hearing of these matters.

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In sum, the Complainant's bare assertion that it took three months to process his resume in retaliation for his raising of safety concerns is unsupported by the record. There is no evidence of a list or record barring the Complainant's future employment with APS which would constitute a "blacklist." The Complainant has failed to establish a *prima facie* case of improper retaliation or discrimination under the Act.

Third Complaint: Referrals from Cal-Test

Gibson alleged that Warren Weems did not select him as one of eight electricians out of 17 referrals from Cal-Test because of the safety concerns that he had raised. Because Weems knew of Gibson's assertion of safety concerns, a *prima facie* case of discrimination has been made. The burden now shifts to the Complainant to establish by a preponderance of the evidence that Weems' decision not to select Gibson was motivated by reasons prohibited under the Act.

Weems gave legitimate, nondiscriminatory reasons for not selecting Gibson. He maintained that Gibson was not selected because of his refusal to work with certain other individuals in the past, his lack of formal training, his paucity of nuclear experience, and the fact that he had become less productive in late 1989.

Weems was cross-examined extensively regarding the way in which he selected from among the 17 applicants. Weems testified that he had selected them based upon his personal knowledge of them and their work habits, as well as the experience and education listed on their resumes. He also stated that he "put quite a bit of stock in apprenticeships." The record demonstrates that the eight electricians selected by Weems had formal education and/or apprenticeships. Gibson's resume, on the other hand, indicates no apprenticeship and only that he had taken various classes. Although Gibson testified that he had had an apprenticeship, this was not listed on his resume. It is reasonable, therefore, for Weems to conclude from the face of his resume that Gibson possesses little formal training and no apprenticeship.

Weems also considered prior work performance and, although this is a more subjective consideration, it does not, standing alone, evidence discriminatory or retaliatory motive. The eight

applicants selected by Weems exhibited good performance histories. Gibson's refusal to work with others constitutes a legitimate reason for rejection. Weems recalled that Gibson refused to work with Kathy Smith, Manuel Salcido, and Dick Wendt. Gibson testified at one point during the hearing the he *had* told Weems that he did not want to work with these individuals. Indeed, Gibson stated that he had told William Ecker that he would "go home sick, if he had to work with Dick Wendt, but later testified that he "changed his mind" about Wendt.

Weems also testified that he rejected Gibson because he had become less productive in late 1989. Olson likewise stated that Ron Eban had reported that Gibson seemed "less productive and more argumentative" upon his return from the three day suspension in December of 1989, and his testimony is credible. Productivity, or lack thereof, is a proper basis for Weems to have in rejecting Gibson. An allegation that contractors "played cards" during the work days at Palo Verde is irrelevant. Moreover, the fact that Weems, at a later time, hired a particular electrician as a personal favor to a friend, and that he eventually requested that a group of electricians be sent over by the Atlantic Group without any prescreening, does not give rise to an inference of improper motive in rejecting Gibson.

The Complainant has failed to establish, by a preponderance of the evidence, that Weems rejected Gibson for impermissible purposes under the Act. There is no outstanding discrepancy in Weems' selection of the eight electricians based upon the numerous objective factors and past work performances which he considered. It is inappropriate to second-guess personnel decisions in the absence of such a discrepancy. As a result, the Complainant's allegation that Weems "blacklisted" him because of his expression of safety concerns is rejected.

Based on the foregoing, and upon the entire record, the following Recommended Order is entered.

RECOMMENDED ORDER

It is ORDERED that the three complaints filed by Curtis Gibson in the captioned matters be, and they hereby are, DISMISSED.

Lawrence E. Gray
Administrative Law